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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. A-655 — 76-1183

HAROLD P. ROBB, M.D., individually
and by his successor in office, C. DUANE HENSLEY, Ph.D.,
Director of the Department of Mental Health, and
PATRICK J. GANNON, M.D., individually and by
his successor in office, SADASHIV D. PARWATIKAR, M.D.,
Superintendent, St. Louis State Hospital,

Petitioners,

v.

RICHARD KENNEDY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

RUPPERT AND SCHLUETER

By _____
FRANCIS L. RUPPERT

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Attorneys for Respondent

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v.

RICHARD KENNEDY,

Respondent.

REASONS FOR DENYING WRIT

THE DECISION BELOW DOES NOT CONFLICT WITH CONTROLLING OPINIONS OF THIS COURT, AND DOES NOT INTERFERE WITH A STATE'S RIGHT UNDER THE TENTH AMENDMENT TO GOVERN ITS OWN EMPLOYER-EMPLOYEE RELATIONSHIPS.

The thrust of Petitioner's Argument here is that because this court granted Certiorari in Quinn v. Muscare, 425 US 560 (May 3, 1976), and then dismissed the writ when the Respondents therein voluntarily amended their own regulations to provide for pretermination notice and right to be heard, those facts reflect a conflict. This reasoning is difficult to grasp, for surely the absence of a decision by this court cannot be construed as conflicting with the decision of the Court of Appeals for the Eighth Circuit in this case.

The case closest to point, and considered by this Court, is Goss v. Lopez, 95 S.Ct. 729 (1975). In that case, this Court held that the Fourteenth Amendment to the United States Constitution provided for a de minimus right to advance notice and opportunity to be heard in those cases where the threatened state action consisted of short-term suspensions from the public educational system. Under the relief fashioned by the

Court of Appeals for the Eighth Circuit, Respondent is to (1) be given an opportunity to examine the investigative file upon which his notice of discharge was based and (2) be permitted to meet with the discharging officer to present his rebuttal to the charges. No provision has been made for calling witnesses; for testimony under oath; for recording or transcribing the proceedings; for the preservation of evidence; or for the presence of counsel, much like the Court's relief specified in Goss, supra.

The Court of Appeals for the Eighth Circuit did not, in effect, declare the Missouri Civil Service System unconstitutional. (Petition for Writ of Certiorari, Page 19). It merely filled in a gap in the Missouri Civil Service System, adding to the existing procedural requirements the requirement that a pre-termination risk-minimizing procedure be followed.

THE DECISION DOES NOT CONFLICT WITH THE HOLDING OF THIS COURT IN ARNETT V. KENNEDY, 416 US 134 (1974) OR BOARD OF REGENTS V. ROTH, 408 US 564 (1972).

Petitioners argue that the decision of the Court of Appeals conflicts with this Court's holdings in Arnett v. Kennedy, 416 US 134 (1974) and Board of Regents v. Roth, 408 US 564 (1972). In Arnett, a plurality of this Court held that Federal Law does not require a trial-type pre-termination hearing, where a post-termination hearing is provided by Statute. A salient distinction between Respondent's case and that decided by the Court in Arnett is that Arnett had, under Federal Law, a thirty day period in which to respond in writing to the charges. Thus, the decision below provides Respondent with exactly the same rights as conferred by Federal Law in Arnett, that is, a minimization of blatant injustices through a "notice-opportunity to respond-decision" procedure.

Petitioners likewise cannot rely on Board of Regents v. Roth, 408 US 564 (1972) or on Bishop v. Wood, ____ US ____ 48 L.Ed. 2d 684 44 USLW 4820 (June 10, 1976). In Roth, no "tenure" right was conferred by New York Statutes and Roth's contract merely lasted from year to year. In Bishop, the Court specifically found that the employment was at the will of the City, with no rights of any kind implied by Statute or State Law. This Court's opinion in Bishop emphasizes the weight to be given to a lower Court's interpretation of State Law. The District Court Judge who decided Respondent's case, (opinion attached hereto) grounds his decision on Federal Law, and it was only the Court of Appeals for the Eighth Circuit which exhaustively examined State Statutes in this determination.

CONCLUSION

This Court should decline to grant Petitioner the Writ of Certiorari, for the reasons stated above. In addition, in both the District Court and in the Court of Appeals for the Eighth Circuit, Respondent raised three issues:

(1) The failure to grant a pre-termination hearing for a "tenured" State employee constituted a denial of due process, and

(2) That failure to grant a pre-termination hearing where Respondent's discharge was based upon allegations of inefficiency, inaptitude, and dishonesty deproved him of a protected liberty interest in due process, and

(3) Petitioners' failure to follow the procedures required by Bulletin No. 116 deprived Respondent of due process under State Law.

The Court of Appeals grounded its decision on Respondent's claim of a "property right", expressly declining to reach the issue of his "liberty right", and declining to meet the issue of the significance of Bulletin No. 116. Thus, at least one issue remains unresolved by the Court below, which will have to be addressed somewhere in the interest of a complete adjudication of this case. Churchwell v. U.S., 545 F2d 58 (8th Cir. 1976).

Respectfully submitted,

RUPPERT AND SCHLUETER

By Francis L. Ruppert
FRANCIS L. RUPPERT

CERTIFICATE OF SERVICE

Two copies of the foregoing were served by placing the same in regular United States Mail to Daniel P. Card, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, this 10 day of May, 1977.

FRANCIS L. RUPPERT

Accordingly, summary judgment will be entered for the defendants.

Dated this 17 day of February, 1976.

H. Kenneth Wangelin
United States District Judge